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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 83

GERTRUDE CROMBIE, *Petitioner,*

vs.

HELEN F. CROMBIE, *Respondent.*

PETITION FOR REHEARING AFTER DENIAL OF WRIT OF CERTIORARI

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THREE GROUNDS OF INTERVENING CIRCUMSTANCES OF SUBSTANTIAL OR CONTROLLING EFFECT, NOT PREVIOUSLY PRESENTED HEREIN. (RULE 58.)

1. Reply brief received herein October 7, 1965, by each Justice of the Supreme Court after the case had been presented in conference, but before its delayed consideration and decision was reached on October 11, 1965, did not allow sufficient time, due to excusable

delay by petitioner, for all of the Justices to read and jointly consider the same. (Rule 41.)

2. Absence of any evidence whatever at the trial on the prime issue deprived the trial court of jurisdiction to render an affirmative judgment, which, when rendered, denied due process of law to petitioner, according to recent decisions not previously presented. (Rule 58.)

3. The lack of public interest and the obscurity and lack of social prominence of the petitioning widow herein, while clearly justifying the Supreme Court in its discretional denial of her petition herein, may, nevertheless, appeal to this court's often recognized purpose to exercise equal consideration and protection to such a minor litigant, and thus procure for her due process of law herein.

I. EXCUSABLE CIRCUMSTANCES PREVENTING ALL THE JUSTICES OF THIS COURT FROM FULLY READING OR JOINTLY CONSIDERING PETITIONER'S REPLY BRIEF HEREIN, BEFORE DENYING SAID PETITION.

These circumstances were as follows: Petitioner's counsel received on August 23rd, a letter from the Office of the Clerk of the United States Supreme Court, stating that this "matter has been reassigned as docket No. 83, October Term, 1965", (formerly No. 1102, Oct. Term. (1964)), and that petitioner's reply brief could be filed "without requesting permission." This letter was in reply to said counsel's letter dated August 13, 1965, asking that your clerk's office make

request for submission of the exhibits in this proceeding, particularly plaintiff's Exhibit 7, from the trial court's clerk in San Francisco, as proposed by counsel's letter, in order to enable your court to examine the same, when considering the present petition for a Writ of Certiorari. Such an examination would have demonstrated the total absence of any evidence of the insurance policy under which the respondent had sought to quiet her title to the entire death benefits paid by such policy, and in which respondent claimed to have received a community property interest by virtue of a contract executed several years prior to the existence of this unintroduced policy. Your clerk replied that he had no authority to make such a request, unless directed to do so by your court. Counsel planned to seek this direction not later than the opening day of the new term, Monday, October 4, 1965,—even though he assumed it might take at least a week or more thereafter before the court could reach No. 83. He had received no information or knowledge to the contrary.

Consequently, counsel, completed his 28-page manuscript of the petitioner's reply brief including a request for Exhibit 7, by Thursday, September 30, 1965, and placed it in the hands of the printer, one of the best in the West, by noon of the next day. Counsel failed to instruct the printer to get it out by the following Saturday evening at all costs, which could have been done,—as he did not then realize its urgency. On Monday, October 4th, counsel made inquiry regarding the printing, and was told it might be several days

before the briefs would be ready. Counsel at once wrote, airmail, to the U. S. court's clerk asking his advice by telephone, collect, as to the state of the court's calendar. The clerk's telephone call was received Tuesday before noon (which was three hours later in Washington), stating that the Supreme Court was even then in formal conference and might already be considering this very petition. He agreed that the best he could do would be to deliver the briefs to the Justices as soon as he received them, which he recognized could not be then before Thursday afternoon, October 7, 1965. Counsel urged the clerk to advise the Justices of the Supreme Court at once that the briefs would be on their way the following day, Wednesday. He replied that he could not do that. The printing company was immediately alerted. They got the briefs into the mails the next day, Wednesday, before 5 p.m. Counsel was later advised by letter, from the U. S. Supreme Court Clerk, dated October 15, 1965, as follows:

> "your brief was actually received on October 7 and distributed to the Justices individually on that date. Thus, although the brief was not before them at the time of their formal conference, it was called to the attention of each Justice before the order issued, and the order could have been withheld if any of them had believed it appropriate."

This distribution to the Justices individually must have been late on Thursday afternoon, since 5 p.m. Wednesday San Francisco would be 8 p.m. Washington, and it usually requires at least sixteen hours for

a bundle of briefs to be delivered special delivery to the Clerk's office from San Francisco. With Saturday and Sunday intervening before the court denied this petition on Monday, October 11th, there was very little likelihood that any, and even less likely that all, of the Justices would have read the briefs, so as to have caused even one of the nine Justices to believe "it appropriate" to request that the order be "withheld". It was even less likely that the entire court would have had any time, during those three days to consider the brief collectively and seriously. We, therefore, believe that the petitioner should be given a further opportunity to have her Reply Brief read and considered carefully at some further "formal conference." (Rules 41 and 58.) We do hereby most earnestly urge that your court grant a rehearing for this purpose.

Counsel hereby certifies that the foregoing facts are true and correct, under penalty of perjury, over his signature at the end of this brief,—which certificate is deemed equivalent to an affidavit under the California law. (C.C.P. 2015.5.)

It is counsel's firm conviction that this reply brief, with its concentration upon this one issue, of lack of jurisdiction in the trial court, due to its *total lack of any evidence,* to sustain any affirmative judgment, without violating due process of law, represents the only brief that plaintiff,—the appellant and petitioner herein,—need have presented to each of the appellate courts involved. With such concentration, the result might have been different. Instead, this one supreme

issue in all of the other briefs, though urged, became lost in a morass of irrelevant issues, which we, (perhaps unkindly) have now designated "red herring issues." The United States Supreme Court likewise is now urged to concentrate upon this one issue, in this final reply brief, which perhaps is the only brief that this court has not yet read and has had no opportunity to consider carefully.

Even the trial court and the pre-trial court agreed that the case should be decided on the written documents alone, particularly the one policy under which the death benefits were payable, and its connection to any prior cancelled policies or agreements involving an earlier community property interest of the parties. But the trial court overlooked at the trial that the final policy had never been introduced into evidence, and that no earlier community property interest had ever been shown to have any connection with this undisclosed, unintroduced *final policy*. Plaintiff's voluminous Exhibit 7, when introduced into evidence, was erroneously assumed to contain this final policy. However, when petitioner later searched for its terms and provisions in this Exhibit 7, in order to attack the judgment, it was first discovered never to have been introduced. Neither that court nor either of the litigants know to this day what the terms and conditions of that policy are. We have already shown, in petitioner's reply brief herein, how persistently petitioner called attention to this omission. But all to no avail.

This petition for a rehearing should, therefore, be granted in order to enable this court to review and

reconsider in conference, said reply brief and to examine said Exhibit 7.

II. NEWLY PRESENTED DECISIONS THAT DUE PROCESS WAS DENIED BY THE TRIAL COURT IN ITS RENDITION OF ITS JUDGMENT IN RESPECT TO PAYMENT OF DEATH BENEFITS UNDER A POLICY WHICH WAS NEVER INTRODUCED IN EVIDENCE, WHICH WAS NEVER SHOWN TO BE SUBJECT TO ANY EARLIER COMMUNITY PROPERTY INTERESTS OF THE INSURED WITH HIS FIRST WIFE, AND WHICH ALONE COULD HAVE GIVEN THE TRIAL COURT JURISDICTION TO RENDER AN AFFIRMATIVE JUDGMENT IN THIS ACTION.

This is the sole point that petitioner sought to present in her 28-page reply brief on her petition for a Writ of Certiorari, which she now urges this court to consider fully,—since it has not heretofore had an opportunity to do so in formal conference. We have here stated this point in only six and ten lines, and now present new authorities in support thereof. Our former search and failure to find law on this point, has now been rewarded. We have necessarily drawn upon the entire field of American jurisprudence, rather than from Federal and California decisions alone. These new decisions are here presented for the first time:

> "It has been said that the definition of jurisdiction should properly include the power to render the particular judgment in the particular case, and that the mere fact that a court has jurisdiction of the subject matter of an action does not justify the exercise of a power not au-

thorized by law; . . . it is clear that every final act in the form of a judgment or decree granting relief the law declares shall not be granted is void, even when collaterally called in question." (28 Cal. Jur. 2d 615.)

Tonningsen v. Odd Fellows' Cemetery Assn. (1923) 60 C.A. 568, pp. 571, 572, 213 Pac. 710, citing:

United States v. Walker (1883) 109 U.S. 258, pp. 265-7,

where the United States Supreme Court stated (p. 266):

"Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the power granted to it by the law of its organization, its decree is void."

In *Windsor v. McVeigh* (1876) 93 U.S. 274, Justice Field stated (p. 283):

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the case, according to established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it."

"The judgment . . . cannot rest on evidence . . . which was never adduced in court, such as matters not put in evidence of which the court took judicial notice. A judgment may not rest on conjecture and speculation or on mere surmise or suspicion, nor may a judgment find support in assumptions." (49 C.J.S., Sec. 44, pp. 103, 104, Notes 46-51.)

The court in *Byrd v. Belcher* (1962, Tenn.) 203 F. Supp. 645, held that a judgment rendered in favor of plaintiff was void inasmuch as there the "court . . . could not rest a judgment . . . on anything more than mere speculation and conjecture", citing *Penn R.R. Co. v. Chamberlain* (1933) 288 U. S. 333, p. 649, 53 S. Ct. 391. Justice Sutherland in this latter cited case (p. 343) drew a distinction between whether "there is literally no evidence", and where there is not enough evidence "upon which a jury can properly proceed to find a verdict for the party producing it", citing *Pleasant v. Fant,* 22 Wall. 116, pp. 120, 121.

Where there is no evidence, the judgment is void, whereas if the evidence is merely insufficient it is voidable. The present petition involves a case where there was "literally no evidence" on the basic issue. In such a case the trial court lacks jurisdiction to make any affirmative judgment at all, on any kind of assumption, even inadvertence, that such evidence was presented. The trial court then lacks jurisdiction to make such judgment, and it proceeds without due process of law. Furthermore,

> "A void judgment is not rendered valid by mere affirmance on appeal." (29 Cal. Jur. 2d p. 138.)

The trial court cannot assume such nonexistent evidence from any private knowledge or judicial notice of his own, not legally introduced. This was so held in the following cases. This would be equivalent to the assumption by the California District Court of Appeals decision in the present action that the iden-

tity of a number given earlier cancelled policies with that borne by the unintroduced policy in effect on the date of death of the assured—September 28, 1958—proved that the terms, beneficiaries, community property interests, etc., were all identical and the same in the latter policy with the earlier ones.

In *Matthew v. Matthew* (1961, Fla.) 133 So. 2d 91, p. 97, the court held that the trial judge could not take judicial notice in support of its judgment, of evidence introduced in an earlier equity action, though involving the same facts, where a higher degree of proof was there required than in the later action at law, without again introducing the evidence, was without jurisdiction and the judgment void.

In *Hume v. Wright* (1925, Mo.) 274 S.W. 741, where the trial judge likewise took judicial notice of the record in an earlier case involving the same situation, without again taking evidence thereon, the appellate court held:

> "The court had no authority to base its findings and judgment upon any evidence without they were based on evidence offered. It was improper for the court to base its judgment on matters referred to as things of which the court took judicial notice, they not having been put in evidence", citing five other Missouri cases. (p. 744.)

In *State re Nat'l Lead Co. v. Smith* (1939, Mo.) 134 S.W.2d 1061, similar to the *Matthew* case above, involving an occupational disease in a Workman's Compensation case, the appellate court held the judgment in the later case was void and entered without jurisdiction:

"It is held that a court . . . must also have jurisdiction to render the particular judgment or order in the particular case, otherwise the judgment or order is absolutely void." (citing cases.)

"The judgment of the trial court shows on its face that the court dismissed the action without having any evidence whatever before it when the disease or injuries occurred and that action of the court was therefore absolutely void." (p. 1069.)

In *Gray v. Commonwealth* (1954, Ky.) 264 S.W.2d 69, the trial judge, upon his own private investigation or assumption compelled the defendant to go to trial for manslaughter while ill from multiple childbirth, when she could not testify coherently, resulting in her conviction. The appellate court held the judgment void, stating:

"However, in this case there was no evidence presented that appellant was physically able to stand trial." (p. 70.) . . . "While it may be that the trial judge had information from an undisclosed source that appellant was feigning illness, such information does not constitute evidence, nor would the judge be authorized to act upon such information as constituting a fact within his judicial knowledge. 'It matters not what is known to the judge if it is not known to him judicially,' is a maxim of the doctrine of judicial notice. Riley v. Wallace, 188 Ky. 471, 222 S.W. 1085, 11 A.L.R. 337. We have also held that the court must act upon evidence heard in open court and cannot make a private investigation of a matter pending before the court and then base his de-

> cision upon information obtained thereby. Stephenson v. Burton, Ky., 246 S.W. 2d 999. To hold otherwise would destroy the very purpose for which our courts are established.' " (pp. 70-71.)

In *Oldenburg v. Sears Roebuck & Co.* (1957) 152 C.A.2d 733, 741, 314 Pac.2d 33, the appellate court held:

> "A judgment cannot be based on guesses and conjectures", quoting from *Reese v. Smith,* 9 Cal. 2d 324, p. 624, etc. "Nor may a verdict be upheld 'only by resort to speculation.' *Gray v. Carter,* 100 Cal App 2d 642, 645. Substantial evidence is required to establish each essential affirmative allegation—a scintilla of evidence is not sufficient for that purpose."

Nat'l Life etc. Ins. Co. v. Kendall (1933, Ky.) 59 S.W.2d 1009, held, in reference to an accident causing death, reversing judgment, "a judgment cannot be rested on a supposition."

Roadside Rest. Inc. v. Lankershim Est. (1946) 76 C.A.2d 525, 173 Pac.2d 554, involved an inserted modification of an original sublease without any evidence as to the source or authorization for such insertion, whereupon the appellate court declared the trial court's judgment accepting such insertion as a valid part of said lease was to that extent void, stating,

> "a judgment should not rest upon probability, conjecture or vague inferences . . .; the judgment is reversed with directions to enter a judgment declaring that the original sublease without modifications . . . is the only valid and subsisting sublease." (p. 535.)

According to these decisions, and others cited by the foregoing authorities, can the following acts by the trial court herein, and the affirmation thereof by the appellate courts, be held to have given the trial court jurisdiction to have entered its judgment herein within due process of law?

1. The inadvertent act of the court in entering an affirmative judgment, allotting the death benefits to plaintiff, without any evidence whatsoever of who were the beneficiaries, or what were the terms or community property interests, or date of execution, of the insurance policy under which said benefits were paid into escrow, as giving the trial court no jurisdiction to enter said judgment, which therefore is void.

2. The unsupported assumption that the same number (according to the allegations of the complaint) appearing on the unintroduced, death-policy, as was given to prior cancelled policies, constitued proof that all such policies were identical and the same, being an assumption of facts never introduced into evidence, which failed to give the trial court jurisdiction to enter its judgment, and which therefore is void.

3. The silence of the appellate courts, without one word regarding these circumstances in their decisions, though repeatedly called to their attention, as constituting a denial of due process of law to petitioner.

III. A PLEA FOR EQUALITY OF LEGAL PROCESS AND REVIEW FOR THE OBSCURE AND WIDOWED AS FOR ANY CIVIL RIGHTIST.

Petitioner fully recognizes the unrestricted discretion and the great need of limitations, and avoidance of unjustifiable increases of responsibilities and burdens that your court must exercise in granting Writs of Certiorari, and especially a rehearing therefor, once denied. Your clerk's office kindly so advised us in its said letter of October 15th, which petitioner deeply appreciated, and fully understands, where such office stated:

> "The Court very rarely grants such petitions, and it is therefore always a serious question whether the filing of one justifies the expense and trouble involved."

Yet, we feel that the present situation is one of the most unusual and inequitable cases that is ever likely to arise, and one such as the present counsel for petitioner has never before encountered in his half century of active law practice. It has seemed inconceivable to him that due process of law can here be held to have been exercised, where a trial court has assumed jurisdiction, and rendered an affirmative judgment when it had received *no evidence whatsoever* on the first and only important issue involved—the terms and application of the policy under which insurance benefits were paid and to be divided. Even the meager, obscure allegations of the complaint to such policy are not evidence. The California District Court of Appeal in its opinion (attached to Petition for Writ of Certiorari herein), never once referred to

the particular policy in effect at the date of death of the insured, or to the absence of its introduction, or to a single term or provision thereof, nor did it once use the word "community property" as imposed upon such policy or otherwise in said decision.

Petitioner here seeks merely the recourse, to which every man is equally entitled, to due process of law before being deprived of her title in the death benefits which, on the face of the policy paying the same are hers (as indicated in the complaint). She merely here seeks the rendition to her of relief from such denial presently caused by a most unusual and inadvertent oversight and totally unsupported assumption of facts to the contrary by the trial court. This unsupported assumption was also blindly accepted by the California appellate courts without one word of comment thereon. We here seek that the petitioner be not thus deprived of her "property, without due process of law." (U. S. Const. Amends. V and XIV (1).)

Your court is our last bulwark for equal protection of the weak and obscure. Your court stands much in the position toward the American individual as does the great Providence which provides that not a sparrow "can fall to the ground against your Father's will." (Mt. 10:29.) Even as the great Plato once said: "as dear to God is the poor peasant as the mighty prince."

Is there not one of the nine Justices of your great court that is moved to give this obscure petitioner and this her final petition your serious consideration, and to ask to see said Exhibit 7, in order to discover

for yourselves that not one word of the insurance policy which is the central issue herein was ever presented before the trial court, and that its absence was never once commented on by a single word in the decisions of either of the California appellate courts herein, though called repeatedly to their attention.

Dated, San Francisco, California,
November 1, 1965.

Respectfully submitted,
PAUL E. SLOANE,
Attorney for Petitioner.

CERTIFICATION

It Is Hereby Certified that in the judgment of counsel for the petitioner said Petition is well founded and is not interposed for the purpose of delay.

PAUL E. SLOANE,
Attorney for Petitioner.